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No. 235

Supreme Court of the United States

(OCTOBER TERM, 1943)

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

VERSUS

JESS G. READ, INSURANCE COMMISSIONER
FOR THE STATE OF OKLAHOMA,
Respondent.

REPLY BRIEF OF AMICI CURIAE

JOHN H. MILEY,
RUSSELL V. JOHNSON,
1039 First National Building,
Oklahoma City, Oklahoma,
Amici Curiae.

February, 1944.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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STATEMENT

The statement of the case which appears on pages 1 to 6 of respondent's answer to brief amici curiae pertains to the jurisdiction of this Court and inferentially suggests that this Court withhold its decision herein on the merits of this case until the Supreme Court of Oklahoma hands down its decision in the Lincoln National Life Insurance Company case, and determines the meaning of the Oklahoma constitutional and statutory provisions quoted and discussed in the several briefs filed herein.

The brief of amici curiae is limited to the questions raised upon the merits of this action. Whether or not the

State of Oklahoma has given its consent to be sued for the recovery of taxes other than ad valorem taxes, the complaint of petitioner (R. 3) sets forth special circumstances establishing personal liability against respondent. *A. T. & S. F. Railway Co.* v. *O'Connor*, 223 U. S. 280, 56 L. ed. 436.

The Supreme Court of Oklahoma in the case of *New York Life Ins. Co.* v. *Board of County Com'rs* (pp. 48-50, brief amici curiae) has held that the gross premium tax law in question "is a tax on the business" which is "subject to no constitutional limitation or inhibition, except that such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with the Federal Constitution."

Regardless of what meaning the Supreme Court of Oklahoma has placed, or might place, upon the law in question, this Court will exercise its independent judgment in determining whether the tax with the meaning given violates the Federal Constitution (pp. 19-24, brief amici curiae).

The 4% Gross Premium Tax Law of Oklahoma does not conform to the equal protection clause of the Fourteenth Amendment for the reasons:

(1) A like tax is not collected on the premiums of competing domestic insurance companies.

(2) Domestic insurance corporations are exempted from the insurance premium tax laws of Oklahoma.

(3) Domestic insurance corporations do not share the

burden of any other form of taxation fairly equivalent to that imposed upon foreign insurance corporations by said 4% insurance premium tax.

(4) The 4% gross premium tax law of Oklahoma applies a discriminatory tax after the foreign corporation is admitted to do business in Oklahoma and after issuance of each renewal license.

(5) Such *invalid* tax cannot constitute a *valid* condition precedent to the issuance of renewal licenses.

Respondent's first proposition on page 7 of answer to brief amici curiae states that the tax is not invalid for the reason numbered (1) above. However, we contend that by reason thereof, together with reasons (2), (3), (4) and (5) above stated, the tax is invalid. All five reasons are fully discussed in the brief amici curiae.

Respondent's argument appearing on pages 7 to 20 of answer to brief amici curiae obviously ignores the operation and effect of the tax law in question and the salient rules and principles announced in the Hanover case. Paragraphs (a) and (b), pages 7 and 8 of respondent's answer to brief amici curiae, contain faulty, misleading, and confusing statements of the contentions of amici curiae. In order to clarify any misunderstanding which might result, reference is made to the brief amici curiae.

The brief amici curiae reveals that according to the Constitution and Statutes of Oklahoma, the uniform administrative practice since statehood, the findings of the trial court and the Circuit Court of Appeals in the case at bar, and the findings of the trial court in the Lincoln Na-

tional Life Insurance Company case, the gross premium *tax law in question operates and applies after a foreign insurance corporation is first admitted into Oklahoma and after the issuance of each annual renewal license.* (Proposition II, pp. 41-56, brief amici curiae).

The Oklahoma Supreme Court has held that the law imposes a tax on the business done (pp. 48-49, brief amici curiae). It is payable at the end of the license year for the privilege of having done business in the State (p. 45, brief amici curiae).

The tax is measured solely on gross premiums collected in the state. Therefore, the law cannot apply until after the foreign company is admitted into the state and does business. If the foreign company withdraws from the state at the end of its first license year, the tax is then due and must be paid. If it renews its license and withdraws from the state at the end of its second or any subsequent renewal license year, the tax is then due and must be paid. (Proposition III, pp. 63-67, brief amici curiae).

The law clearly applies the tax after admission of the foreign corporation into the state, whether it be admitted for an indefinite period or for only one year at a time. The tax is admittedly discriminatory, and since it applies after admission of the foreign company into the state it violates the equal protection clause of the Fourteenth Amendment (Proposition [D], p. 34, brief amici curiae).

Whether the foreign company be licensed for an indefinite period or for only one year at a time, the principle is the same that, pending the period of business per-

mitted, the state must not enforce against its licensees unconstitutional burdens (p. 40, brief amici curiae).

Since the law applies a tax after the admission of the foreign corporation into the state for the first license year and after the issuance of each annual renewal license, and which tax becomes due at the end of each license year for the privilege of having done business in the state, it must be considered as a law enacted for the purpose of raising revenue for the state. Such laws must conform to the equal protection clause of the Fourteenth Amendment (Proposition [D], p. 34, brief amici curiae). Since the tax is admittedly discriminatory, it therefore constitutes an invalid tax. Being an invalid tax, it cannot be exacted upon the withdrawal of the foreign company from the state at the end of its first or any subsequent renewal license year. Being an *invalid tax* at the end of every license year, its payment cannot be made a *valid* condition precedent to a renewal of the annual license (Proposition [E], p. 36, brief amici curiae).

The example stated by respondent at the bottom of page 9 of answer to brief amici curiae is radically different from the manner in which the tax law in question operates and applies. The respondent states:

> "For example, if said contention is sound, a state law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of $1,000.00 on a foreign corporation for the right or privilege of entering the state and doing business therein for a period of either one or twenty years, if said law provides that one-half of said fee is payable on or prior to the commencement of said period and the other one-half payable ten days thereafter."

It may be observed therefrom that *before* the foreign corporation is admitted into the state the license fee of $1,000.00 is established. Its determination is not dependent upon business done *after* admission of the foreign company into the state. It is not a tax on business done and it is not exacted after the privilege of doing business has been exercised. It is a "*license fee*" and is distinguishable from the *license tax* imposed by the gross premium tax law in question. Whether the exaction is a valid excise *tax*, as distinguished from a valid license or admission *fee*, involves inquiry regarding the operation and effect of the tax law (pp. 21-24, brief amici curiae).

We take no issue with respondent's contention that annual privilege taxes may be paid either before or after the exercise of the privilege. We neither argue nor infer that the tax law in question is invalid because it is a privilege tax. The character of the tax is immaterial. The controlling test is to be found in the operation and effect of the law as applied and enforced by the state. But if a privilege tax operates and applies after admission of a foreign corporation into the state, it must conform to the equal protection clause of the Federal Constitution. The 4% privilege tax here in question applies to business done and is determined and paid at the end of each license year and after the privilege is enjoyed.

Respondent concludes the first proposition stated in his answer to brief amici curiae with the suggestion that the law in question is susceptible of a construction that would relieve foreign insurance companies from the payment of the gross premium tax for the privilege enjoyed

during the first license year. We have shown in our brief amici curiae that such construction would violate the express provisions of the constitutional and statutory provisions of Oklahoma. It would be contrary to the uniform administrative practice and interpretation of such laws since statehood and the decision of the Oklahoma Supreme Court in the New York Life Insurance Company case. We have further shown that it is not to be presumed that the Legislature intended to exempt foreign insurance companies from taxation upon their first year's business (pp. 41-52, brief amici curiae).

The construction of the law so suggested by respondent is obviously predicated upon the assumption that this Court will hold that the admission of foreign insurance companies into Oklahoma is limited to the period of the annual license, and that this Court will permit the state to deal arbitrarily with foreign corporations under the guise of conditions precedent to the issuance of annual renewal licenses. We do not so interpret the trend of the decisions of this Court subsequent to the Philadelphia Fire Association case. In this regard may we respectfully direct the Court's attention to our discussion of this question on pages 63 to 77 and pages 81-85 of the brief amici curiae.

Respectfully submitted,

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February, 1944.

CONCLUSION

In conclusion, we desire to point out that if domestic insurance companies of Oklahoma were also subjected to the tax law here in question, or if the rate of the tax imposed solely against foreign insurance companies resulted in foreign and domestic insurance corporations sharing fairly equivalent tax burdens, no complaint would be justified. Under the 2% rate applicable in Oklahoma during practically 35 years prior to the increase of the rate to 4% under the 1941 amendment, foreign insurance companies in Oklahoma did not bring the law into question. Whether there existed any substantial inequality of tax burdens as between domestic and foreign insurance companies before the increase has never been judicially determined.

Whatever view foreign insurance companies may have taken regarding the former 2% rate, we find the 4% rate is such a heavy discrimination in favor of domestic companies of the same class that we are impelled to strenuously resist the imposition. This question is of vital importance to the business of insurance in the State of Oklahoma.

The Hanover case does not permit speculation as to whether the State in dealing with foreign corporations violates the equal protection clause of the Federal Constitution. Disguise and manipulation by the State and its administrators should not be countenanced for, as stated in the case of *Marion L. Frost et al.* v. *Railroad Commis-*

sion of the State of California, cited under our Proposition I (E), the guaranties of the Federal Constitution could in that manner be manipulated out of existence.

The tax law in question is a form of unconstitutional discrimination, the vicious nature of which was sensed fully by Justice BRADLEY in the minority opinion in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, (such minority opinion now being the law governing this Court). In that case Mr. Justice BRADLEY says:

> "The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring States would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations, at least those of a commercial or financial character, should be able to transact business in different States. If these States can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the Government and laws of the United States may be nullified and rendered inoper-

ative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

"The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and General Governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

It is well established by the decisions of this Court cited herein, that a State may not exact as a condition of the corporations engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. By following the same line of reasoning employed in the above quotation from the opinion in *Doyle* v. *Continental Insurance Company*, *supra*, it may be said that if the States can limit the period of admission of foreign insurance corporations to one year at a time, and then as a condition precedent to the annual readmission, deal arbitrarily with such foreign corporations, the guaranties of the Federal Constitution would be avoided.

The requirements of the Oklahoma law that insurance corporations obtain annual licenses is a proper regulation of the business of both domestic and foreign insurance companies. The business of insurance is of a continuing nature requiring ' ge capital and investments. Both domestic and foreign companies are regulated on a continuing basis subject to rigid requirements to safeguard the lawful right and powers of the state. Adequate

provisions are made for the termination of the right of such companies to continue to do business in the state if they violate the laws of the state. We fail to see how such requirements applying to both domestic and foreign insurance companies can fairly be interpreted as limiting the period of admission of foreign insurance companies to the period of each annual license.

What could be the purpose behind the law of any state that expressly limits the period of admission of foreign corporations to one year and at the same time establishes the procedure for annual readmissions, other than to subject such corporations to arbitrary treatment at the will of the state? What could be the state's purpose in so doing, other than to excuse its arbitrary exactions under the guise of conditions precedent to the annual readmission? Under such practice the foreign corporation may in reality be within the limits of the state for many years but at all times subject to discrimination in favor of similar domestic corporations. A state should not be presumed to have limited the admission of foreign corporations into the state to a definite period in the absence of clear and express language to that effect. But where it is found that the state so intended, the practice should meet with condemnation from this Court. The qualification in the power of the state to impose conditions upon admission of foreign corporations within its limits as expressed in the earlier decisions of this Court has been necessarily extended from time to time in order to assure the preservation of the guaranties of the Federal Constitu-

tion. The effect of an attempt by the state to limit the period of admission of a foreign insurance company to one year at a time is just as offensive as the situations dealt with in the class of cases considered in the opinion in the Hanover case.

Whether foreign corporations are admitted into Oklahoma for an indefinite period or for one year at a time, the tax law here in question applies a discriminatory tax after the issuance of the license each year and can not constitute a valid condition precedent either to an annual admission or the renewal of the annual license.

We respectfully submit that the gross premium tax law of Oklahoma (Tit. 36, Okla. Stat. 1941. sec. 104) is repugnant to the guaranties of the Fourteenth Amendment; that any such law is repugnant to the guaranties of the Fourteenth Amendment if the rate of taxation prescribed thereunder results in discrimination in favor of similar domestic insurance companies.

Respectfully submitted,

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January, 1944.

APPENDIX I

GENERAL INSURANCE ACT OF 1909

(Ch. 21, Art. I, p. 312, Session Laws of Oklahoma 1909, approved March 17, 1909.)

Sec. 5—(Sec. 8, Tit. 36, Okla. Stat. 1941—*Business Limited by Certificate—Other Restrictions on Business Carried On*):

"No company shall be formed in this state or foreign company admitted to this state, for the purpose of engaging in any kind of insurance; other than that specified in its certificate of incorporation, original or amended, nor any kind of business except that allowed domestic corporations under this act."

Sec. 11.—(Sec. 47, Tit. 36, Okla. Stat. 1941—*Certificates Issued—Commissioner to Examine First—Books and Records*):

"Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance, the Insurance Commissioner shall be satisfied, by such examination as he may make and such evidence as he may require, that such company is otherwise duly qualified under the laws of the state to transact business herein."

Sec. 12.—(Sec. 48, Tit. 36, Okla. Stat. 1941—*Examination and Audit of Domestic Companies*): Contains requirements for the examination of domestic insurance companies by the Insurance Commissioner.

Sec. 13.—(Sec. 49, Tit. 36, Okla. Stat. 1941—*Examination and Audit of Foreign Companies*):

"Whenever the Insurance Commissioner deems it prudent for the protection of the policy holders of this state, he shall, in like manner, visit and examine or cause to be visited and examined by some competent person or persons whom he may appoint for that purpose, any foreign insurance company applying for admission or already admitted to do business in this state."

Sec. 15.—(Sec. 51, Tit. 36, Okla. Stat. 1941—*Foreign Companies' Authority Revoked, When—Manner*):

"If the Insurance Commissioner is of the opinion, upon examination or other evidence, that any foreign insurance company is in an unsound condition or has failed to comply with the law or with the provisions of its charter or that its condition is such as to render the proceedings hazardous to the public or to its policy holders or that its actual funds, exclusive of capital stock, are less than its liabilities, or if it or its officers, directors, trustees or agents refuse to submit to an examination or to perform any legal obligation relative thereto or fail to pay any final judgment against it by a citizen of this state, he shall revoke or suspend all certificates of authority granted to it or its agents and shall cause notification thereof to be published in one or more newspapers of general circulation in the state, and no new business shall thereafter be done by it or its agents in this state while such default or disability continues, nor until its authority to do business is restored by the Insurance Commissioner; provided, however, that unless the ground for revocation or suspension relates only to the financial condition or the sound-

ness of the company or to a deficiency in its assets, he shall notify the company, not less than ten days before revoking its authority to do business in this state, and he shall specify in the notice the particulars of the supposed violation."

Sec. 18, as amended, being Sec. 101, Tit. 36, Okla. Stat. 1941:

(*Foreign Insurance Companies—Conditions of Admission to do Business*):

"No foreign insurance company shall be admitted and authorized to do business in this State until:

"First: It shall fiile or deposit with the insurance commissioner a properly certified copy of its charter, or deed of settlement, and a statement of its financial condition and business on the thirty-first day of December preceding the day on which it shall apply for permission to transact such business, including such other information and in such form and detail as the insurance commissioner may require, signed and sworn to by its president and secretary and other proper officers.

"Second: It shall satisfy the insurance commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact in this State; that, if a life insurance company, a surety company or a bond company, it has on deposit with the Treasurer of this State or with the proper officer of some other state, securities to the actual cash value of at least one hundred thousand dollars consisting of the bonds of this State, the United States, or the state in which such company is organized, or notes or bonds secured by mortgages on improved real estate worth double the amount of such

notes or bonds, and such company shall file with the insurance commissioner the certificate of the official with whom its securities are deposited stating the time and amount of each of said bonds, notes or stocks, and that he is satisfied that they are worth one hundred thousand dollars, and that the deposit is made with him by the company for the protection of all its policy holders and creditors in the United States. Provided, that surety and bond companies shall be required to have not less than four hundred thousand dollars paid up capital in cash or invested in such securities, as, under the laws of this State, domestic companies are allowed to invest in, which are satisfactory to the insurance commissioner.

"Third: Insurance companies, other than surety and bond companies, shall be required to have a paid up capital or guaranty capital or surplus of not less than one hundred thousand dollars in cash or invested in securities satisfactory to the insurance commissioner and consisting of such securities as under the laws of this State, domestic companies are allowed to invest in: provided, however, that the funds of such foreign insurance companies in excess of such minimum of one hundred thousand dollars may at all times be invested in such securities as are or may be authorized by the laws of the State in which such companies are organized or in which they have and maintain their United States deposit. Nothing in this Section shall be construed to permit the admission of mutual companies other than as provided in Section 3 of this Act, except fraternal and benevolent orders and societies.

"Fourth: It shall, by duly executed instrument filed in his office, constitute and appoint the insurance commissioner, or his successor, its true and lawful attorney, upon whom all lawful processes in any action or

legal proceeding against it may be served and therein shall agree that any lawful process against it, which may be served upon its said attorney, shall be of the same force and validity as if served upon the company, and that the authority thereof shall continue in force, irrevocable, as long as any liability of the company remains outstanding in this State. Any process issued by any court of record in this State, and served upon such commissioner by the proper officer of the county in which said commissioner may have his office, shall be deemed a sufficient process on said company, and it is hereby made the duty of the insurance commissioner to promptly, after such service of process, forward by registered mail, an exact copy of such notice to the company; or, in case the company is of a foreign country, to the resident manager in this country; and also shall forward a copy thereof to the general agent of said company in this State. For power of attorney, each company shall pay a fee of three dollars, and for each copy of process, the insurance commissioner shall collect the sum of three dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable cost, if he prevails in his suit. (R. L. 1910, Secs. 3421, 3422; Laws 1910-11, ch. 93, p. 203, Sec. 1; Laws 1925, ch. 131, p. 196, Sec. 1.)"

Sec. 21—(Sec. 56, Tit. 36, Okla. Stat. 1941—*Annual Statement by Companies—Annual License*):

"The Insurance Commissioner shall, in December of each year furnish to each of the insurance companies, authorized to do business under the provisions of this act, two or more blanks in form adopted for their annual statement, and such companies shall, annually, on or before the last day of February, file in the office of

the Insurance Commissioner a statement which shall exhibit its financial condition on the 31st day of December of previous year and its business of that year. For good cause shown, the Commissioner may extend the time within which such statement may be filed. Every such annual statement shall be in the form and of the specifications the Insurance Commissioner may require. The assets and liabilities shall be computed and allowed in accordance with the laws of this state. Such statement shall be subscribed and sworn to by the president and secretary and other proper officers. And if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company

a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this state, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue. The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business."

Sec. 22, as amended, being Sec. 10478, Okla. State. 1931:

(*Foreign Companies—Annual Report of Premiums—Fees and Taxes*):

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief

officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

Sec. 25, as amended, being Sec. 121, Tit. 36, Okla. Stat. 1941:

(*Agents—License of Agents*):

"Upon written notice by an authorized foreign insurance company of its appointment of a suitable person to act as its agent within this State, and the payment of three dollars, the Insurance Commissioner shall, if the facts warrant it, grant to such person a

license, which shall state in substance that the company is authorized to do business in this State and that the person named therein is a constituted agent of the company for the transaction of such business as it is authorized to do in this State: Provided, that domestic insurance companies shall pay fifty cents, only, for each agent's license. Said license shall continue in force until the last day of February next after its issue, and, by the renewal thereof, on the annual payment for such renewal of three dollars, if a foreign company, and if a domestic company, on the annual payment of fifty cents, until revoked by the Insurance Commissioner for non-compliance with the laws or until the company, by written notice to the Insurance Commissioner, cancels the agent's authority to act for it. While such license remains in force, the company shall be bound by the acts of the person named therein within his authority as its acknowledged agent. (R. L. 1910, Sec. 3429.)"

Sec. 26, as amended, being Sec. 122, Tit. 36, Okla. Stat. 1941:

(*Violation by Agent a Misdemeanor—Penalty*):

"Whoever shall, directly or indirectly, aid in transacting insurance business for any such company without first receiving such certificate of authority, or after receiving from such Insurance Commissioner notice of the revocation thereof continue to act as agent for any such company, shall be deemed to be guilty of a misdemeanor, and upon conviction by a court having jurisdiction, be fined not less than one hundred dollars nor more than five hundred dollars; the issuance of each policy or contract shall constitute a separate and distinct offense. (R. L. 1910, Sec. 3430.)"

Sec. 29, as amended, being Sec. 124, Tit. 36, Okla. Stat. 1941:

(*Personal Liability of Agent—Unlawful Contract*):

"Every agent or other person shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or on behalf of any insurance company not authorized to do business in this State. (R. L. 1910, Sec. 3432.)"

Sec. 31—(Sec. 126, Tit. 36, Okla. Stat. 1941—*Resident Agents for Foreign Companies—Exceptions*):

"Foreign companies admitted to do business in this state shall make contracts of insurance upon lives, property or interests herein, only through lawfully constituted and licensed resident agents: * * *"

Sec. 61, as amended, being Sec. 199, Tit. 36, Okla. Stat. 1941:

(*General Agency in State Required*):

"All life insurance companies doing business under the laws of this State shall be required to maintain a general agency within the State, in charge of a resident general agent. (R. L. 1910, Sec. 3464.)"

APPENDIX II

Sec. 1, Ch. 1-a, Tit. 36, Session Laws of Oklahoma, 1941—House Bill No. 353, Sec. 104, Tit. 36, Okla. Stat. 1941, (effective April 25, 1941).

(Foreign Companies, Copartnerships, etc., and Non-residents—Annual Report of Premiums—Fees and Taxes):

"Every foreign insurance company, copartnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addition to an annual tax of three dollars ($3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any sub-division or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of

said taxes, the sum of five hundred dollars ($500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State." (Session Laws of Oklahoma 1941, p. 121—Sec. 104, Tit. 36, Okla. Stat. 1941).

APPENDIX III

ILLINOIS PREMIUM TAX ACT OF 1919

(Act of June 28, 1919)

"An Act in Relation to the Taxation of Non-resident Corporations, Companies, and Associations for the Privilege of Doing an Insurance Business in this State.

"Section 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY: That each non-resident corporation, company, and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual state tax for the privilege of doing an insurance business in this State, equal to two per centum of the gross amount of premiums received during the preceding calendar year * * *.

* * * *

"Section 6. * * * the tax herein provided to be paid shall be due and payable on the first day of July of each year, and shall be the tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

* * * * *

"Section 9. On or before the fifteenth day of May of each year, the Department of Trade and Commerce shall mail a notice in writing to each corporation, company, and association against which a tax is assessed, stating the amount of the tax assessed against it for the year next ensuing commencing on July 1, * * *. Such notice shall further state that the tax therein assessed is payable to the Department of Trade and Commerce on July 1, after the date of said notice.

* * * *

"Section 13. Each corporation, company, or association applying for a license to do an insurance business in this State, and which was not licensed to do such business in this State during the preceding calendar year, or any part thereof, shall, before said license is issued, pay to the Department of Trade and Commerce at the rate of three hundred dollars per annum for as many months as will elapse between the date of issuance of such license and the first day of July of the calendar year succeeding the calendar year in which such license is issued, and such payment shall be for the privilege of doing an insurance business in this State, during the period aforesaid.

* * * *

"Section 15. The authority of each non-resident corporation, company, and association, admitted to do an insurance business in this State, shall be evidenced by a license to be issued by the Department of Trade and Commerce, in which shall be stated the kind or kinds of insurance business authorized to be transacted. All licenses issued by virtue of the provisions hereof shall terminate on the thirtieth day of June next after the date thereof, and may be renewed annually thereafter upon compliance with the laws of this State. * * *" (Ch. 73, Cahill's Rev. Stat. of Illinois, 1925.)

p. 14,

SUPREME COURT OF THE UNITED STATES.

No. 235.—October Term, 1943.

Great Northern Life Insurance Company, Petitioner, *vs.* Jess G. Read, Insurance Commissioner for the State of Oklahoma. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 24, 1944.]

Mr. Justice Reed delivered the opinion of the Court.

This writ brings here for review the action of petitioner, a foreign insurance company, to recover taxes paid to respondent, the Insurance Commissioner of Oklahoma, which were levied by Section 10478, Oklahoma Statutes 1931, as amended by Chapter 1(a), Title 36, Session Laws of Oklahoma 1941. This was an annual four per cent tax on premiums received by foreign insurance companies in Oklahoma, and it, together with certain specified fees, was in lieu of all other taxes and fees in Oklahoma. Petitioner paid the tax under protest and, alleging diversity of citizenship, 28 U. S. C. § 41, brought suit against the Insurance Commissioner in the District Court of the United States. The procedure for recovery is laid down by Section 12665, Oklahoma Statutes 1931.[1]

[1] "12665. Payment Under Protest Where Relief by Appeal Not Provided —Action to Recover.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

The percentage of premiums due was increased from two to four per cent by the amendment of 1941, effective April 25th of that year. The District Court refused recovery. The Circuit Court of Appeals affirmed. *Great Northern Life Insurance Co.* v. *Read*, 136 F. 2d 44. Certiorari was granted on petitioner's assertion of error in requiring it to pay a tax allegedly discriminatory under the Fourteenth Amendment as compared with the taxation of domestic insurance companies, and also unconstitutional as levied after the company's admission to the state and on premiums collected during the business year for which a license was already in force. A conflict in principle was suggested with *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494. We granted certiorari, 320 U. S. 726, and asked discussion of the right of petitioner to maintain its suit in a Federal court. As we conclude that this suit could not be maintained in the Federal court, we do not reach the merits of the issue as to the validity of the tax.

The right of petitioner to maintain this suit in a Federal court depends, first, upon whether the action is against an individual or against the State of Oklahoma. Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the Federal court.

Respondent challenged the right of petitioner to seek relief in the District Court by the defense in its answer that the complaint fails to state a claim upon which relief can be granted. R. C. P. 12(b) and (c).[2] This challenge, on the ground that the state had not consented to be sued, was sustained by the District Court. The contention is available here to sustain the judgment on appeal. *LeTulle* v. *Scofield*, 308 U. S. 415.

In *Smith* v. *Reeves*, 178 U. S. 436, an action was instituted in the Federal trial court by railroad receivers against the defendant "as Treasurer of the State of California" to recover taxes assessed against and paid by the railroad. The proceeding was brought under Section 3669 of the California Political Code, as amended

[2] There is here no want of jurisdiction of the parties or subject matter. We are not passing upon a certification of an issue as to jurisdiction such as arose under the Act of March 3, 1891, § 5, 26 Stat. 827, in Illinois Central Railroad Co. v. Adams, 180 U. S. 28, 37. If this is a suit against the state, a failure to show the state's consent to be sued in the face of this answer would be fatal. Cf. Berryessa Cattle Co. v. Sunset Pacific Oil Co., 87 F. 2d 972, 974.

by California Statutes (1891) 442, which authorized a suit against the State Treasurer for the recovery of taxes which were illegally exacted. The defendant could demand trial of the action in the Superior Court of the County of Sacramento, California. If the final judgment was against the Treasurer, the Comptroller of the state was directed to draw his warrant on state funds for its satisfaction.

As the suit was against a state official as such, through proceedings which were authorized by statute, to compel him to carry out with the state's funds the state's agreement to reimburse moneys illegally exacted under color of the tax power, this Court held, p. 439, it was a suit against the state. The state would be required to pay.[3] The case therefore is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state law, *Atchison &c. Ry. Co.* v. *O'Connor*, 223 U. S. 280; cf. *Matthews* v. *Rodgers*, 284 U. S. 521, 528; to recover under general law possession of specific property likewise wrongfully obtained or held, *Tindal* v. *Wesley*, 167 U. S. 204, 221; *Virginia Coupon Cases*, 114 U. S. 269, 285; *United States* v. *Lee*, 106 U. S. 196; to perform a plain ministerial duty, *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Rolston* v. *Missouri Fund Com'rs*, 120 U. S. 390, 411; or to enjoin an affirmative act to the injury of plaintiff, *Sterling* v. *Constantin*, 287 U. S. 378, 393; *Tomlinson* v. *Branch*, 15 Wall. 460; *Davis* v. *Gray*, 16 Wall. 203, 220; *In re Tyler*, 149 U. S. 164, 190. Only in *Smith* v. *Reeves* was the action authorized by statute against the officer in his official capacity. In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally.

This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. *Chandler* v. *Dix*, 194 U. S. 590; *Fitts* v. *McGhee*, 172 U. S. 516, 529; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 167; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 468 *et seq.*; *Ex parte State of New York, No. 1*, 256 U. S. 490, 500; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 296, 299.

[3] Pennoyer v. McConnaughy, 140 U. S. 1, 10. Compare Louisiana v. Jumel, 107 U. S. 711, 726.

Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. *Monaco* v. *Mississippi*, 292 U. S. 313, 320; *Louisiana* v. *Jumel*, 107 U. S. 711, 720. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. *Hans* v. *Louisiana*, 134 U. S. 1, 10, 16.

Oklahoma provides for recovery of unlawful exactions paid to its collectors under protest. Section 12665 Oklahoma Statutes 1931. Note 1, *supra*. In our view of this case it is unnecessary for us to pass upon whether this method of protecting taxpayers was intended to be exclusive of all other remedies, including actions against an individual who happened to be a tax collector, or whether if it were so intended it would surmount all constitutional objections. Compare *Burrill* v. *Locomobile Co.*, 258 U. S. 34, and *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 341-43. See also *Antrim Lumber Co.* v. *Sneed*, 175 Okla. 47, 49-51, 52 P. 2d 1040, 1043-45.

A suit against a state official under Section 12665 to recover taxes is held to be a suit against the state by Oklahoma and the remedy exclusive of other state remedies. *Antrim Lumber Co.* v. *Sneed*, *supra*, 175 Okla. at 51, 52 P. 2d at 1045. This interpretation of an Oklahoma statute by the Supreme Court of the state accords with our view, as set out above, of the meaning of a suit against a state. Petitioner brought this action against the collector, the Insurance Commissioner, in strict accord with the requirements of Section 12665. It alleged that there was no appeal provided by Oklahoma laws from defendant's action in collecting and gave notice of protest and suit to defendant at the time of payment in the language of the Section. By so doing petitioner was relieved of the necessity of establishing that the payment was not voluntary[4] and obtained the advantage of a statutory lien *lis pendens* on the tax payment.

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[4] Board of Com'rs Love Co. v. Ward, 68 Okla. 287, 288; Broadwell v. Board of Com'rs Carter Co., 71 Okla. 162, 163; cf. Ward v. Love Co., 253 U. S. 17, 22; Broadwell v. Carter Co., 253 U. S. 25; Carpenter v. Shaw, 280 U. S. 363, 369; Railroad Co. v. Commissioners, 98 U. S. 541, 544; Stratton v. St. L. S. W. Ry., 284 U. S. 530, 532.

By Section 12665, Oklahoma creates a judicial procedure for the prompt recovery by the citizen of money wrongfully collected as taxes. It is the sovereign's method of tax administration. Oklahoma designates the official to be sued, orders him to hold the tax, empowers its courts to do complete justice by determining the amount properly due and directs its collector to pay back any excess received to the taxpayer. The state provides this procedure in lieu of the common law right to claim reimbursement from the collector. The issue of coercion and duress was eliminated at the pre-trial conference without objection by the petitioner. The section makes sure the taxpayer's recovery of illegal payments. The section is like the California statute involved in *Smith* v. *Reeves, supra*, except for the immaterial difference that the money collected is directed to be held separate and apart by the collector instead of being held in the general funds of the State Treasurer. See § 3669, California Political Code, as amended by California Statutes (1891) 442. In the *Reeves* case, as here, the suit was against the official, not the individual. The Oklahoma section differs from the Colorado law, Section 6, Chapter 211, Session Laws of Colorado 1907, considered in *Atchison &c. Ry. Co.* v. *O'Connor, supra*, in that the Colorado statute left the taxpayer to his remedy against the collector and merely directed the refund of the tax by the Treasurer in accordance with any judgment or decree which might be obtained. In the *O'Connor* case, in accordance with the statute, the suit, as this Court's opinion shows, was against the individual, not the official. We are of the view that the present proceeding under § 12665 is like *Smith* v. *Reeves*, a suit against the state.

But it is urged that if this is a suit against the state, Oklahoma has consented to this action in the Federal court. Cf. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedure. *Antrim Lumber Co.*

v. *Sneed*, 175 Okla. 47, 52 P. 2d 1040; *Patterson* v. *City of Checotah*, 187 Okla. 587, 103 P. 2d 97; *Beers* v. *State of Arkansas*, 20 How. 527; *Kawananakoa* v. *Polyblank*, 205 U. S. 349; *Minnesota* v. *United States*, 305 U. S. 382, 388; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512.[5] The immunity may, of course, be waived. *Clark* v. *Barnard*, 108 U. S. 436, 447. When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, *Traction Company* v. *Mining Company*, 196 U. S. 239, 255, but when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.[6]

The Oklahoma section in question, 12665, was enacted in 1915 as a part of a general amendment to then existing tax laws. Session Laws 1915, p. 149, Chap. 107, Art. One, subdivision B, sec. 7.[7] This subdivision of the act of 1915 is concerned with administrative review of boards of equalization and provides a complete procedure including review by the district and Supreme Court of Oklahoma, as the case may be, which are given authority to affirm, modify or annul the action of the boards. Sections 2 and 3. Section 6 requires the payment of the taxes which fall due, pending administrative review, and provides for recovery of such taxes in accordance with the ultimate finding on review in language practically identical with that of Section 7 (§ 12665) here involved. Furthermore, section 12665 gives directions to the Oklahoma officer as to his obligations, requires the court to give precedence to these cases and directs the kind of judgment to be returned, see note 1, *supra*, which is quite different in language, if not in effect, from the judgment a Federal court would render. It is clear to us that the legis-

[5] Keifer & Keifer v. R. F. C., 306 U. S. 381, is not to the contrary. When authority to sue is given that authority is liberally construed to accomplish its purpose. United States v. Shaw, 309 U. S. 495, 501.

[6] Cf. Matthews v. Rodgers, 284 U. S. 521, 525. The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court. Stanley v. Schwalby, 162 U. S. 255, 270; Minnesota v. United States, 305 U. S. 382, 384, 389.

[7] See also Session Laws 1913, Ch. 240, Art. 1, sec. 7.

lature of Oklahoma was consenting to suit in its own courts only. *Chandler* v. *Dix*, 194 U. S. 590.

Smith v. *Reeves*, *supra*, p. 445, holds that an act of a state is valid which limits to its own courts suits against it to recover taxes. There California's intention to so limit was made manifest by authorizing the state officer to demand trial in the Superior Court of Sacramento County. *Atchison &c. Ry. Co.* v. *O'Connor*, considered above at p. 5, is not applicable since it was not a suit against the state.

Petitioner urges that *Smyth* v. *Ames*, 169 U. S. 466, 517, and *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S. 362, 391, 392, are precedents which lead to a contrary conclusion on this issue of the suability of Oklahoma in the District Court of the United States. The former is clearly inapposite. That case involved proceedings to enjoin enforcement of an allegedly unconstitutional state statute providing for intrastate railroad rates. Since the state act provided a remedy, the state took the position that Federal equity jurisdiction was ousted. This Court held the Federal equity jurisdiction continued to restrain unconstitutional acts by state officers which threatened irreparable damage. Pp. 474, 477, 515-19.

In the *Reagan* case, a proceeding for injunction to restrain the members of the Texas Railroad Commission from enforcing rates which were alleged to be unconstitutional was allowed to be maintained in equity in a Federal court. This Court said it was maintainable against the defendants both under the general equity jurisdiction of the Federal courts and under the provisions of the state statute which allowed review "in a court of competent jurisdiction in Travis County, Texas . . . ." It was thought that the United States Circuit Court, sitting in Travis County, was covered by this language. As it was concluded, however, that this was not a suit against the state, page 392, we do not feel impelled to extend the ruling of the *Reagan* case on this alternative basis of jurisdiction to a suit, such as this, against a state for recovery of taxes.

Gunter v. *Atlantic Coast Line*, 200 U. S. 273, is also distinguishable. There the Attorney General of South Carolina appeared in a Federal court to answer for the state in an injunction suit under the authority of a statute which read as follows:

"if the State be interested in the revenue in said action, the county auditor shall, immediately upon the commencement of said action, inform the Auditor of State of its commencement, of the alleged cause thereof, and the Auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State." P. 286.

This Court construed this to consent to an appearance in the Federal court and held its decision res judicata against the state and added at p. 287:

"If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the Pegues case, and by the action as well as non-action which followed the decision of that case by the state government in all its departments through a long period of years."

The administrative construction by a state of these statutes of consent have influence in determining our conclusions. Cf. *Farish* v. *State Banking Board*, 235 U. S. 498, 512; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44, 47; *Missouri* v. *Fiske*, 290 U. S. 18, 24.

It may be well to add that the construction given the Oklahoma statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by the state courts. *Chandler* v. *Dix*, 194 U. S. 590, 592; *Smith* v. *Reeves*, 178 U. S. 436, 445.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to dismiss the compiaint for want of jurisdiction.

Mr. Justice FRANKFURTER, with whom the CHIEF JUSTICE and Mr. Justice ROBERTS concur, dissenting.

To avoid the imposition of penalties and other serious hazards, the plaintiff paid money under claim of a tax which Oklahoma, we must assume, had no power to exact. Concededly, he could sue to recover the moneys so paid to the defendant, a tax collector, in a state court in Oklahoma. But to allow the suit to be brought in a federal court sitting in Oklahoma would derogate, this Court now holds, from the sovereignty of Oklahoma. Such a result, I believe, derives from an excessive regard for formalism and from a disregard of the whole trend of legislation, adjudication and

legal thought in subjecting the collective responsibility of society to those rules of law which govern as between man and man.

To repeat, this is a simple suit to get back money from a collector who for present purposes had no right to demand it. So far as the federal fiscal system is concerned, this common law remedy has been enforced throughout our history, barring only a brief interruption.[1] See *United States* v. *Nunnally Investment Co.*, 316 U. S. 258. And if, instead of avoiding the serious consequences of not paying this state tax, the plaintiff had resisted payment and sought an injunction against the tax collector for seeking to enforce the unconstitutional tax, under appropriate circumstances the federal courts would not have been without jurisdiction. See, *e.g.*, *Western Union Telegraph Co.* v. *Trapp*, 186 Fed. 114; *Ward* v. *Love County*, 253 U. S. 17; *Carpenter* v. *Shaw*, 280 U. S. 363. Finally, as I read the opinion of the Court, even a suit of this very nature for the recovery of money paid for a disputed tax will lie against the collector in what is called his individual capacity; that is, a suit against the same person on the same cause of action for the same remedy can be brought, if only differently entitled. In view of the history of such a suit as this and of the incongruous consequences of disallowing it in the form in which it was a case in the federal court in Oklahoma, the claims of sovereignty which are sought to be respected must surely be attenuated and capricious.

The Eleventh Amendment has put state immunity from suit into the Constitution. Therefore, it is not in the power of individuals to bring any State into court—the State's or that of the United States—except with its consent. But consent does not depend on some ritualistic formula. Nor are any words needed to indicate submission to the law of the land. The readiness or reluctance with which courts find such consent has naturally been influenced by prevailing views regarding the moral sanction to be attributed to a State's freedom from suability. Whether this

[1] The Swartwout scandal led to the Act of March 3, 1839 (§ 2, 5 Stat. 339, 348), which this Court construed as a withdrawal of the suability of the collector. Cary v. Curtis, 3 How. 236. That decision was rendered on January 21, 1845, and Congress promptly restored the old liability. Act of Feb. 26, 1845, c. XXII, 5 Stat. 727. See Brown, *A Dissenting Opinion of Mr. Justice Story* (1940) 26 Va. L. Rev. 759. Again, in view of the complicated administrative problems raised by the invalidation of the Agricultural Adjustment Act, Congress devised a special scheme for the recovery of the illegal exactions made under the Act. 49 Stat. 1747, 7 U. S. C. § 644 *et seq.*; Anniston Mfg. Co. v. Davis, 301 U. S. 337.

immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see *Kawananakoa* v. *Polyblank*, 205 U. S. 349, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that "it is a wholesome sight to see 'the Crown' sued and answering for its torts." 3 Maitland, Collected Papers, 263.[2]

Assuming that the proceeding in this case to recover from the individual moneys demanded by him in defiance of the Constitution is a suit against the State, compare *Ex parte Young*, 209 U. S. 123, 155; *Atchison, &c. Ry. Co.* v. *O'Connor*, 223 U. S. 280, Oklahoma has consented that he be sued. The only question therefore is as to the scope of the consent. Has she confined the right to sue to her own courts and excluded the federal courts within her boundaries? She has not said so. Is such restriction indicated by practical considerations in the administration of state affairs? If it makes any difference to Oklahoma whether this suit against a tax collector is pressed in an Oklahoma state court rather than in a federal court sitting in Oklahoma, the difference has not been revealed. There is here an entire absence of the considerations that led to the decision in *Burford* v. *Sun Oil Co.*, 319 U. S. 315. There it was deemed desirable, as a matter of discretion, that a federal equity court should step aside and leave a specialized system of state administration to function. Here the suit in a federal court would not supplant a specially adaptable state scheme of administration nor bring into play the expert knowledge of a state court regarding local conditions. The subject matter and the course of the litigation in the federal court would be precisely the same as in the state court. The case would merely be argued in a different building and before a different judge. Language restrictive of suit in a federal court is lacking, and intrinsic policy does not suggest restrictive interpretation to

[2] "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Doubtless this statement of Dicey's, *Law of the Constitution*, 8th Ed. at p. 189, 9th Ed. at p. 193, was an idealization of actuality. But in the perspective of our time its validity as an ideal has gained and not lost.

withdraw from a federal court questions of federal constitutional law.

Legislation giving consent to sue is not to be treated in the spirit in which seventeenth century criminal pleading was construed. Only by such overstrained rendering of the Oklahoma Statute does the Court finally achieve exclusion of the right of the plaintiff to go to a federal court. To the language of that Statute I now turn. By § 12665 Oklahoma Statutes, 1931, the State authorized an action to recover moneys illegally exacted as a tax, in a situation like the present, where the exaction is one "from which the laws provide no appeal". The relevant jurisdictional provision is as follows: "All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein . . . ." The part that the federal courts play in the grant of such jurisdiction by the States is not a new problem. With his customary hard-headedness Chief Justice Waite, for this Court, stated the guiding consideration in ascertaining the relation of the federal court within a State to the judicial process recognized by that State: "While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for." *Ex parte Schollenberger*, 96 U. S. 369, 377. This conception of a federal court as a court within the State of its location has ever since dominated our decisions. See, *e.g.*, *Traction Company* v. *Mining Company*, 196 U. S. 239, 255-56; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 171. It is a conception which has been acted upon by state legislatures. For jurisdictional purposes federal courts have been assimilated to the courts of the States in which they may sit. When we are dealing with jurisdictional matters legislation should be interpreted in the light of such professional history. Even if an ambiguity could be squeezed out of a grant of jurisdiction which applies so aptly to a federal court in Oklahoma as to an Oklahoma state court—"suits shall be brought in the court having jurisdiction thereof"—neither logic nor history nor reason counsels an interpretation that attributes to the State hostility against a suit in a federal court on an exclusively federal right as to which the last say in any event belongs to a federal court.[3]

[3] Of course the State can at any time withdraw its consent to be sued. See Beers v. State of Arkansas, 20 How. 527. But statutes have steadily enlarged the range of a state's suability and rarely has there been a recession.

In the past, even when the jurisdictional grant has been couched in language giving substantial ground for the argument of restriction of jurisdiction to the state court, this Court has not found denial by a State of the right to go to a federal court within that State when it in fact opened the door of its own courts. Thus, in *Traction Company* v. *Mining Company, supra,* a Kentucky statute required, among other things, appointment of commissioners in a condemnation proceeding by the county court, examination of the report at its first regular term, issuance of orders in conformity with the Kentucky Civil Code of Practice and allowance of appeals from the county courts. And yet this Court held, as a matter of construction, that it was "not to be implied from the statute in question that the State intended to exclude . . . the Federal courts". 196 U. S. at 256. The Section now under consideration is only one of several statutory provisions for challenging like tax assessments in courts. In all the other provisions, the jurisdiction is explicitly given only to state courts. See, *e.g.*, §§ 12651, 12660, 12661. If in § 12665 Oklahoma has seen fit to allow suits to be brought "in the court having jurisdiction thereof", which as a matter of federal jurisdictional law certainly includes the federal court in Oklahoma, and has not seen fit to designate the state courts for such jurisdiction, why should this Court interpolate a restriction which the Oklahoma Legislature has omitted? The fact that the Legislature has also provided that such suits "shall have precedence" is no more embarrassment to federal jurisdiction than to state jurisdiction. That is merely an admonition to courts of the importance of disposing of litigation affecting revenue with all convenient dispatch. Nor is there any other provision of the Statute giving this right of action that remotely requires a procedure to be followed or relief to be given peculiar to state courts or different from established procedure and relief in the federal courts. Only on the assumption that federal courts are alien courts is there anything in § 12665 that is not as suited to a proceeding in a federal court as it is to one in a state court.

The situation thus presented by the Oklahoma legislation is very different from that which was here in *Chandler* v. *Dix,*

See, generally, Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform* (1934) 20 A. B. A. J. 747; Borchard, *Governmental Responsibility in Tort* (1926) 36 Yale L. J. 1, 17, (1927) 36 Yale L. J. 757, 1039, (1928) 28 Col. L. Rev. 577, 735.

194 U. S. 590. There a suit was brought against state officials to remove a cloud on title to lands claimed by the State. The relief that was sought and the procedure for pursuing it plainly indicated "that the legislature had in mind only proceedings in the courts of the State. A copy of the complaint is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the Auditor General, and this is to be in lieu of service of process. It then is left to the discretion of the Auditor General to cause the Attorney General to represent him, and it is provided that in such suits no costs shall be taxed. These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control. . . . [The] statute does not warrant the beginning of a suit in the Federal court to set aside the title of the State." 194 U. S. at 591-592. The marked difference between the Michigan Statute and this Oklahoma Statute is further evidenced by the fact that § 12665 gives an action to recover not merely illegal state taxes but also taxes of the "county or sub-division of the county" that have been illegally collected. But counties or their sub-divisions do not enjoy immunity from suit. *Lincoln County* v. *Luning*, 133 U. S. 529; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 71. If the other jurisdictional requirements are present, they can be sued in a federal court without the leave of Oklahoma. It is not, I submit, a rational way to construe the Oklahoma Statute, dealing with a particular type of illegal exaction, raising the same kind of issue and involving the same procedure, so as to recognize jurisdiction of federal courts over suits against the county and its sub-division but to find a purpose to exclude suits as to illegal state exactions.

I have proceeded on the assumption that the action below was under § 12665, and as such an action against the State. But the suit was not brought under § 12665. It was brought as an ordinary common law action for the recovery of money against an officer acting under an unconstitutional statute. The defendant answered the suit, but did not claim the State's immunity from suit and the court's resulting lack of jurisdiction. What is even more significant is that he did allege lack of jurisdiction on another ground not now relevant. In a word, the defendant did not claim, on behalf of the State, the immunity which this Court now affords him. He did not even make this claim at the pre-

trial conference and the claim did not emerge as one of the issues defined by the pre-trial conference under Rule 16. In disposing of the case, the Judge interpreted the action as having been brought under § 12665, although the pleadings gave no warrant for such conclusion, and on such interpretation, he found that the defendant could claim and had not waived Oklahoma's immunity. Evidently, however, the District Court was not content with its own finding of want of "jurisdiction" for it proceeded to dispose of the constitutional issues on their merits. I think that the claim of the State's immunity was not in the case under *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, which held that in a suit nominally against an individual sovereign immunity is a defense that must be raised by appropriate pleading. Doubtless for this reason, the jurisdictional question on which the case is now made to turn was not even discussed by the Circuit Court of Appeals.

That court, I believe, ~~was right in passing~~ properly passed on the constitutional merits, but since the case here goes off on jurisdiction, I intimate no views upon them.